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No. 09-1314

IN THE

Supreme Court of the United States

CHARLES L. RYAN, Director,
Arizona Department of Corrections,

Petitioner,

v.

DANNY LEE JONES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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Capital Case

Questions Presented for Review

1. Whether this Court should deny review of the question presented – whether the court of appeals read a new requirement in *Ake* – where the claim was not raised below or addressed in the lower court, is unworthy of certiorari review because there is no real circuit split concerning the requirements of *Ake*, and the court of appeals did not create a new requirement in *Ake*. Moreover, this case is not the proper vehicle to decide this issue.

2. Whether the court of appeals conducted a standard and appropriately deferential review, finding that the lower courts's decisions were not reasonable within *any* reading of *Strickland*.[1]

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1. The opposition to Petitioner's questions presented in II and III, are combined in this section.

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Respondent, Danny Lee Jones, respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the unanimous Ninth Circuit Court of Appeals's decision in this case. That opinion is reported at 583 F.3d 626 (9th Cir. 2009).

Statement of the Case

Jones respectfully directs this Court to, and adopts herein, the detailed recitation of the underlying facts and procedural history set forth in the decision below.[2] Jones was convicted of two first degree murders in Arizona and sentenced to death. His convictions and sentences were affirmed on direct appeal. Pet. App. E.

In state post-conviction proceedings, Jones raised numerous claims of ineffective assistance of trial counsel including counsel's failure to timely seek appointment of a *defense* mental health expert who could have evaluated whether Jones suffered from neurological disorders and organic brain dysfunction and who could have determined the links between such disorders and Jones's behavior the night of the crime (later known as subclaim O of the federal habeas petition); trial counsel's failure to timely seek neurological and neuropsychological testing to provide mitigation at sentencing (later known as subclaim P of the federal habeas petition); and ineffectiveness based on trial counsel's failure to substantiate claimed mitigation

2. Petitioner attached as Appendix A to their Petition for a Writ of Certiorari a copy of the decision below. Reference to the opinion below in this brief will be to Appendix A and will be noted as "Pet. App. A-__."

through witnesses and available records (later known as subclaim T of the federal habeas petition). Pet. App. C.

Jones also diligently filed numerous requests for funds, discovery, and expert assistance (specifically a mitigation specialist and neurological and neuropsychological testing) that were denied. The state post-conviction court summarily denied subclaim O, but held a limited evidentiary hearing on subclaims P and T before denying relief on the claims. The state post-conviction court found that Jones failed to show deficient performance by trial counsel because the court's own expert, Dr. Jack Potts,[3] "adequately addressed [Jones's] mental health issues at sentencing," and that the trial lawyer "presented the available witnesses and evidence to support mitigation," and that the additional witnesses and evidence suggested by Jones "would have been redundant." Pet. App. D-3. The Arizona Supreme Court summarily denied review. Pet. App. A-8.

In habeas corpus proceedings in the district court, Jones was granted an evidentiary hearing on the three afore-mentioned ineffective assistance of counsel at sentencing subclaims: Claim O - defense counsel's failure to secure the appointment of a mental health expert; Claim P – defense counsel's failure to move for

3. Pursuant to Jones's motion for a mental health evaluation, Dr. Potts was ordered by the trial court to perform a psychiatric evaluation of Jones under Rule 26.5 of the Arizona Rules of Criminal Procedure which provides that "the court may order the defendant to undergo mental health examination or diagnostic evaluation."

neurological and neuropsychological testing; and Claim T – defense counsel's failure to present additional mitigation witnesses and evidence. Pet. App. A-8.

During the hearing, among other evidence and testimony, Jones presented the following: Jones presented two experts, Dr. Pablo Stewart, a psychiatrist and Dr. Alan Goldberg, a neuropsychologist, at the evidentiary hearing who testified to his extensive history of physical, mental, and sexual abuse, numerous head injuries resulting in unconsciousness, and a lifetime of substance abuse. Dr. Stewart diagnosed Jones with cognitive dysfunction (brain damage), Post Traumatic Stress Disorder, Attention Deficit disorder, and an affective mood disorder. In addition Dr. Stewart explained that Jones's substance addictions likely stemmed from a genetic predisposition and his attempts to self-medicate.

In addition, Jones presented the testimony of Dr. Potts, the original court appointed psychiatrist. Dr. Potts testified that he was not an expert for either party at trial, that he was not hired for mitigation, and that he conducted a cursory examination of Jones.

The district court found that Jones was not entitled to relief on the three claims because of his failure to "affirmatively prove prejudice," with regard to his ineffective assistance of counsel claims, and denied Jones's remaining habeas claims in a separate order. On appeal finding clear error, a three-judge panel unanimously reversed the decision of the district court. Pet. App A.

Subsequently, a circuit judge *sua sponte* requested a vote on whether to rehear this matter *en banc*, supplemental briefs were ordered and filed, the request for a vote was withdrawn, and *en banc* proceedings concluded. Resp't App. A.[4]

Reasons for Denying the Petition

This case is about ineffective assistance of counsel in a capital sentencing proceeding. In March, 2005, the district court granted an evidentiary hearing on that specific question, and the district court's determination that Jones was not entitled to relief was briefed before the court of appeals below. *See* Pet. App. A-1. A unanimous panel of the court of appeals reversed and found Jones's trial counsel failed to properly investigate and present readily available mitigation evidence during the capital sentencing proceedings, and further determined Jones was prejudiced by that failure.

Petitioner does not present a compelling reason for the Court to grant certiorari. Petitioner has presented no sound reason to differentiate this case from the many capital cases where state officials merely disagree with the conclusion of a lower court. The unanimous court of appeals's decision is a fact-bound, detailed ruling, which does not create a real conflict with decisions from other circuits, contravene the precedent of this Court, or otherwise involve a question of exceptional importance, beyond the specific factual setting of this case. *See* S. Ct. R. 10.

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4. Reference to Jones's Appendix will be noted as "Resp't App. __."

Petitioner is merely requesting error correction from this Court. This Court's burden and responsibilities are too great to review and correct every misstep made by a lower court. *See* S. Ct. R.10 (Court will rarely grant review where the lower court has arguably misapplied "a properly stated rule of law"). Otherwise, the Court becomes just another court of appeals, contrary to its mission. "This Court's review [ ] is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974).

The court of appeals properly relied upon *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny in reaching its decision – that defense counsel's failure to secure testimony of a non-neutral mental health expert and to timely move for neurological and neuropsychological testing; as well as defense counsel's failure to conduct adequate mitigation investigation and present sufficient mitigation evidence during the sentencing phase deprived Jones of effective assistance of counsel.

I.

This Court should deny review of the question presented – whether the court of appeals read a new requirement in *Ake*[5] – where the claim was not raised below or addressed in the lower court, is unworthy of certiorari review because there is no real circuit split concerning the requirements of *Ake*, and the court of appeals did not create a new requirement in *Ake*. Moreover, this case is not the proper vehicle to decide this issue.

A. Petitioner avoided briefing this question before the court of appeals, despite ample opportunity to allow the lower court to pass on this question through mandatory *en banc* briefing; given Petitioner's deliberate decision, this question is now waived.

Petitioner failed to preserve this question presented for this Court's review. *See Bivens v. Six Unknown Named Agents Fed. Bureau of Narcotics*, 403 U.S. 388, 397-98 (1971) (Supreme Court will not consider question not passed upon by the court of appeals). After a *sua sponte* request for a vote on whether to rehear this case, the court of appeals ordered the parties to file briefs "setting forth their respective positions as to whether or not" this case should be reheard *en banc*. Resp't. App. A. Petitioner failed to present this question to the court of appeals.

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5. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

It is a basic axiom that this Court does not accept certiorari on issues that are not raised or passed upon below. *See, e.g., Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 368 n.2 (2006)

> "Neither the District Court nor the Court of Appeals considered the argument that [respondent's] claim was not 'appropriate' apart from the contention that it was not 'equitable,' and from our examination of the record it does not appear that [petitioner] raised this distinct assertion below. We decline to consider it for the first time here."

In the *en banc* briefing, Petitioner mentioned the *Ake* case on one page, merely quibbling with the court of appeals's concern of a confidentiality implication by *Ake*. No mention of his now-important concerns was made.

Petitioner did not make even the most minimal effort to raise this question. As such, Petitioner cannot cite futility as an exception to his waiver. Likewise, Petitioner was ably represented in the proceedings below, and had ample opportunity, and arguably, a duty, once the request for an *en banc* vote was made, to give the court of appeals an honest opportunity to examine this issue. *Cf. Pollard v. United States*, 352 U.S. 354, 359 (1957) (finding an exceptional circumstance and reviewing additional legal questions not presented in the lower courts because prior pleadings had been filed without the assistance of counsel); *see also United Bhd. of Carpenters & Joiners v. United States*, 330 U.S. 395, 399-400 (1947) (finding that although employers did not

raise the issue in lower courts, the unions did, and because both would be entitled to use the issue as a defense to the indictment, fairness compelled its consideration). There is no exceptional reason which allows for consideration of this newly raised question. Petitioner could have timely presented this question below and it is now waived.

B. The court of appeals's decision relies on this Court's well-established *Strickland* precedent and its progeny, and does not add a new requirement to *Ake*.

1. The court of appeals granted ineffective assistance of counsel (at sentencing) relief pursuant to this Court's clearly established *Strickland* precedent.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court set forth the standard which governs ineffective assistance of counsel claims. To prevail on this claim, trial counsel must have performed below objective standards of reasonableness, and the petitioner must have suffered prejudice as a result. *Id.* at 688, 693. In this case, the court of appeals found that trial counsel's failure to secure a mental health expert, and failure to timely move for neurological testing, among other errors, amounted to ineffective assistance of counsel at sentencing. Pet. App. A-17-18.

Petitioner, throughout his petition, asserts that the court of appeals failed to apply this Court's clearly established law. This is erroneous. In fact, at the onset of the discussion of this claim, the court of appeals

diligently sets forth the *Strickland* standard, and its application in *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Williams v. Taylor*, 529 U.S. 362 (2000). Pet. App. A-17-20. The court of appeals analyzed all three ineffective assistance of counsel claims under this rubric.

Petitioner further criticizes the court of appeals for also citing to the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* ("ABA Guidelines") and its own case law in support of its decision. Even the most superficial reading of the court of appeals's decision reveals that the cornerstones of its decision are firmly set in this Court's precedent. Petitioner mischaracterizes the court of appeals's decision when he characterizes it as applying its own case law to this issue. In actuality the court of appeals cited its own case law, as it has applied this Court's precedent.[6]

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6. Petitioner also claims the court of appeals relied "heavily" on *Belmontes v. Ayers*, 529 F.3d 834 (9th Cir. 2008), a case reversed by this Court in *Wong v. Belmontes*, 130 S. Ct. 383 (2009). Pet. at 11. In actuality, the court of appeals cited to the *Belmontes* decision *once*. Pet. App. A-21.

Moreover this Court's reversal of *Belmontes* does not affect this case. In *Wong*, Belmontes alleged that his counsel should have presented additional mitigating evidence; however this Court found that the presentation of such evidence would have opened the door to evidence that Belmontes had committed a second murder. 130 S. Ct. at 384-85. Belmontes's counsel had carefully constructed his mitigation strategy to avoid this outcome. *Id.* at 385-86. This Court held that the additional mitigating evidence that Belmontes alleged should have been

(Cont'd)

Contrary to Petitioner's claim, the court of appeals did in fact consider the district court's decision. Pet. App. A-23-25, A-28-29, A-33, A-39. In addition, the court of appeals's unanimous decision was rendered only after a meticulous review of the voluminous, fact-based record, which comprises ten volumes of excerpts of record totaling 2,996 pages, as well as over 9,000 pages of a state court and habeas record.[7] Moreover, the court of appeals is not confined to the four corners of the district court's opinion, especially when facts set out by the district court were either incomplete and/or wrong and therefore are not supported by the record. *See United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (factual findings by the district court must be supported by the record as a whole). The court of appeals did not fail to defer to the district court, or ignore the district court findings simply because it reached a different result.

In fact, the court of appeals stated "we reweigh the evidence in aggravation against the totality of available

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(Cont'd)

presented had to be weighed against the additional aggravating evidence that would have been admitted along with it–the second murder. *Id.* at 386-87. As such this Court found counsel was not ineffective in failing to present the mitigation evidence.

In this case, Jones's trial counsel did not strategically choose to omit additional mitigating evidence in order to avoid opening the door to the admission of damaging aggravating evidence. All aggravating evidence was already before the sentencing judge.

7. It is of note that from the filing of the opening brief in this case, to a decision, the court of appeals considered this case for almost twenty months.

mitigating evidence." Pet. App. A-19 (quoting *Wiggins*, 539 U.S. at 534). "The totality of available mitigating evidence includes evidence 'both . . . adduced at trial, and the evidence adduced in the habeas proceeding[s].'" Pet. App. A-19. (quoting *Williams*, 529 U.S. at 397). The court of appeals provided an exhaustive summary of the facts, including the facts presented during the state post-conviction court's partial evidentiary hearing and the district court's hearing. Pet. App. A-3-16. And referenced these facts in analyzing Jones's claims. The court of appeals considered the following evidence presented, *inter alia*, to the district court:

> The trial court's expert, Dr. Jack Potts testified that he "was not an expert for either party," but rather was the "court's expert in looking at some issues," and conducted a "gross overview prior to sentencing on psychological or psychiatric information that might be beneficial to the court." He stressed, over and over, that he was "not hired for mitigation" and was instead hired to do an independent mental health evaluation for the trial court. As part of his self-described "cursory examination," Dr. Potts spoke briefly with Jones's mother and his second stepfather about Jones, took note of Jones's numerous head injuries that prompted him to suggest testing necessary to diagnose brain damage. Dr. Potts was given abbreviated or "annotated" records by trial counsel with no social history or background information.

Dr. Potts, prior to the evidentiary hearing, reviewed all of Jones's neuropsychologial and psychiatric reports. All this information compiled by habeas counsel, was simply what Dr. Potts would have "expect[ed] to see in mitigation" at Jones's penalty hearing, and all of it would have been "very, very helpful" to him to fully evaluate Jones's mental health status.

Also during the hearing, Dr. Pablo Stewart, a psychiatrist, explained his approach to a forensic evaluation, which included not only an interview with the patient, but also a review of collateral information, including family interviews, which he did in this case. Dr. Stewart reviewed a variety of documents which compiled a "very rich record." Dr. Stewart diagnosed Jones with organic brain damage, Poly-Substance Abuse, PTSD, AD/HD and Mood Disorder, Not Otherwise Specified (NOS), (Poly-Substance Abuse, PTSD, AD/HD and Mood Disorder, NOS which all cause or contribute to Jones's Cognitive Dysfunction). In addition, Jones was physically, mentally, and sexually abused throughout his childhood by his father, step-fathers and step-grandfather. Furthermore, Jones had a series of head injuries starting with his traumatic birth which included a mugging while Jones was in the military.

See generally, Pet. App. A.

The court of appeals found that Dr. Potts's six-page report, which merely listed potential mitigation factors in equivocal terms, was a far cry from Dr. Stewart's 33-page report which set forth in detail the above listed mental and medical disorders, all of which cause cognitive dysfunction (organic brain damage), as well as Jones's unfortunate background. Pet. App. A-29-30; *See also* Resp't App. B.

Here trial counsel, despite potential mitigating leads, chose not to thoroughly investigate those leads. The court of appeals detailed this failure: "The defense lawyer knew that [Jones] had a difficult birth, he knew that [Jones] had been abused, he knew that [Jones] had suffered multiple head injuries, and he knew that [Jones] had been abusing alcohol and illegal drugs for over a decade." Pet. App. A-25; *See Rompilla*, 545 U.S. at 391-92 (trial counsel was ineffective for failing to follow up on mitigation leads, despite having talked to five family members and an obstructive client that would send trial counsel off on false leads and having three mental health experts evaluate client); *Wiggins*, 539 U.S. at 525 (trial counsel's decision to limit the scope of the investigation into potential mitigation evidence was unreasonable in light of what had already been discovered).

Petitioner argues that trial counsel was not ineffective under *Strickland* because Dr. Potts, the court-appointed psychiatrist, was a *de facto* defense expert. However, as the court of appeals correctly decided, Dr. Potts was not, in any meaningful sense, and certainly not under *Ake*, a defense expert (*de facto* or otherwise). Pet. App. A-23-27. In fact, Dr. Potts testified

he did not act as a defense expert: "I was not an expert for either party. I was the court's expert in looking at some issues . . . it was clear I was not hired for mitigation." Pet. App. A-9.

Counsel did not provide to Dr. Potts all mitigation evidence; instead, counsel screened the information he sent. Pet. App. 23. Even the information counsel did provide was scarce, "[a] review of Dr. Potts's entire case file shows that *only* 31 pages came from the defense lawyer." Pet. App. A-23 (emphasis added). Dr. Potts spent four hours interviewing Jones (1.5 of which was used to administer a personality test); he spoke to Jones's mother by phone for 30 minutes; and he spoke to Jones's step-father for an hour the day before sentencing. Pet. App. A-4. Dr. Potts submitted a six-page report to the court that included only one page of analysis. He explained his severely limited role, "Mine was a cursory examination . . . [I]nterviewing one family member certainly is not adequate, I believe, for what would be considered capital mitigation. It is below the standard of care." Pet. App. A-9.

2. **While the court of appeals necessarily discussed this Court's *Ake* decision in the analysis of Jones's sentencing ineffective assistance of counsel claim regarding trial counsel's *failure to retain an expert*, it did not read a new requirement into *Ake*.**

This Court held that indigent defendants must be provided access to the "raw materials integral to the building of an effective defense" and must be given "an adequate opportunity to present their claims fairly

within the adversary system." *Ake*, 470 U.S. at 77 (internal quotations and citations omitted). This Court further asserted that indigent defendants must be provided "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* at 83. This Court contemplated an integral member of the defense team to the extent that the expert could "assist in preparing the cross-examination of State's psychiatric witnesses." *Id.* at 82.

Presenting psychiatric evidence through an adversary system is necessary because psychiatry is not an exact science and psychiatrists often disagree.[8] *Id.* at 81.

> "By organizing a defendant's mental history, examination results and behavior, and other

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8. Justice Scalia best framed the issue that psychiatric evidence must be presented within an adversarial process, while serving as a District of Columbia Circuit Judge. He wrote:

> Appellant and *amici* would have us believe that the mere availability of cross-examination of the defendant's experts is sufficient to provide the necessary balance in the criminal process. That would perhaps be so if psychiatry were as exact a science as physics, so that, assuming the defense psychiatrist precisely described the data (consisting of his interview with the defendant), the error of his analysis could be demonstrated. It is, however, far from that. Ordinarily the only effective rebuttal of psychiatric opinion testimony is contradictory opinion testimony. . . .

United States v. Byers, 740 F.2d 1104, 1114 (D.C. Cir. 1984).

> information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them."

Id. That did not happen during Jones's capital sentencing.

The court of appeals did not hold in this case, as Petitioner claims, that as a matter of law *Ake* requires a non-neutral psychiatrist. Pet. App. A. Rather, the court of appeals properly granted Jones's ineffective assistance of counsel claim, relying in part on the most narrow reading of *Ake*. *See id.*

"Dr. Potts stated repeatedly that he was a neutral expert and [more importantly] found his role limited as such." Pet. App. A-23. Dr. Potts's "court-appointed" status merely *contributed* to trial counsel's ultimate ineffectiveness because as a court-appointed psychiatrist, no one considered Dr. Potts a defense expert (until it was too late, in the middle of testimony). As a result, as detailed by the court of appeals, trial counsel treated him differently, provided Dr. Potts less access to critical mitigation information, and did not adequately prepare him. Accordingly, Dr. Potts's court-appointed status alone was not dispositive and the court of appeals's own decision in *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990), while noted in its opinion, Pet. App. A-22 , was not necessary to reach its decision.

As stated above, *Ake*'s most narrow reading requires "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 83. Here, the court of appeals found Jones was denied this kind of access – specifically that no psychiatrist, including Dr. Potts, conducted an appropriate examination and *assisted* in evaluating, preparing, and presenting a defense. Pet. App. A-25. Trial counsel failed to obtain a psychiatric defense expert and Dr. Potts did not sufficiently satisfy the requirements of *Ake*. That is the foundation of the court of appeals decision.

C. Petitioner's argument that a circuit split exists is illusionary since there is one rogue circuit (Fifth). This does not constitute a real split but merely an outlier.

Petitioner erroneously claims there is a circuit split as to whether *Ake* requires court appointment of independent defense psychiatric experts to appropriate defendants or whether it requires only the appointment of a neutral psychiatric expert. Pet. at 15-16. Petitioner's claim that "other *circuits* have interpreted *Ake* differently than the Ninth Circuit" *id.* (emphasis added), is patently misleading. The circuits that have decided this issue have followed this Court's reasoning in *Ake* that it requires more than a neutral mental health expert. *Powell v. Collins*, 332 F.3d 376, 392 (6th Cir. 2003) (joining other circuits in holding that a neutral psychiatrist does not satisfy *Ake*); *Starr v. Lockhart*, 23 F.3d 1280, 1290-91 (8th Cir. 1994) (defendant's ability to simply subpoena the mental health professionals involved in his court ordered competency exam did not

satisfy *Ake*); *Cowley v. Stricklin*, 929 F.2d 640, 644 (11th Cir. 1991) (denial of an independent psychiatric expert violated the defendant's right to due process); *Smith*, 914 F.2d at 1158 (9th Cir. 1990) (*Ake* is not satisfied by a "neutral" court psychiatrist); *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) (duty under *Ake* to appoint a psychiatric expert to assist in the defense is not satisfied when the expert's report is shared with the prosecution).

Only *one circuit*, the Fifth Circuit Court of Appeals, reached the opposite conclusion in *Granviel v. Lynaugh*, 881 F.2d 185 (5th Cir. 1989); *accord Woodward v. Epps*, 580 F.3d 318 (5th Cir. 2009).[9] This Court denied certiorari in *Granviel*, but Justice Marshall, joined by Justice Brennan, issued a strong dissent. *See Granviel v. Texas*, 495 U.S. 963 (1990) (mem.) (Marshall, J., dissenting). Petitioner improperly argues that since certiorari was denied in *Granviel*, that suggests that the underlying decision in *Granviel* was correctly decided. Pet. at 16 n. 2. Because denials of certiorari have no precedential value, Petitioner cannot rely upon the denial of certiorari in *Granviel* as evidence that the case was correctly decided.[10] *See Atlantic Coast Line R. Co. v. Powe*, 283 U.S. 401, 403 (1931).

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9. Two panels of the Sixth Circuit Court of Appeals, in *Carter v. Mitchell*, 443 F.3d 517 (6th Cir. 2006) and *Smith v. Mitchell*, 348 F.3d 177 (6th Cir. 2003), agreed with the Fifth Circuit Court of Appeals on this issue, ignoring its circuit precedent in *Powell*. These aberrant decisions should be resolved by the circuit itself through rehearing and is not a ground for review by this Court. *See* S. Ct. R. 10.

10. This Court has also denied certiorari in cases that held the opposite. Because of this, Petitioner's argument fails.

In sum, given the fact that only the Fifth Circuit Court of Appeals and one panel of the Sixth Circuit Court of Appeals (see footnote 4) have concluded that appointment of a neutral expert satisfies *Ake*, it can only be concluded that the current circuit precedent on *Ake* is not a split, but a general agreement among the circuits, with one circuit reaching an incorrect result and one panel issuing an aberrant opinion.

D. Because the court of appeals found sentencing ineffective assistance of counsel relief in three separate issues, and not an *Ake* claim, where the *Ake* analysis is a component of one of the three claims, this case is not an appropriate vehicle for resolving any perceived circuit split regarding the interpretation of *Ake*.

Even if this Court deems it appropriate to resolve any perceived circuit split regarding the requirements of *Ake*, Jones's case is a singularly unsuitable vehicle for resolving a split.

Jones has not raised an *Ake* claim; only ineffective assistance of counsel at sentencing claims are at issue in his case. Furthermore, Jones is entitled to relief on two other separate ineffective assistance of counsel at sentencing claims, regardless of whether *Ake* requires a defense expert or merely a neutral expert. An unfavorable decision by this Court on this question does not affect the outcome for Jones. Finally as set forth above, should this Court decide to address this question, it should do so through a case from the Fifth Circuit Court of Appeals.

It is of note that this Court has consistently passed on this question in cases where the question could have been reached through a less messy record, i.e., better vehicle. *See e.g.*, *Granviel*, 495 U.S. 963, *cert. denied*, 495 U.S. 963 (1990); *Starr*, 23 F.3d 1280, *cert. denied*, 513 U.S. 995 (1994); *Smith*, 914 F.2d 1153, *cert. denied*, 543 U.S. 841 (2004), *and reh'g denied*, 543 U.S. 1016 (2004); *Woodward*, 580 F.3d 318, *cert. denied*, __ U.S. __, 130 S. Ct. 2093 (2010).

II.

The court of appeals conducted a standard and appropriately deferential review, finding that the lower courts's decisions were not reasonable within *any* reading of *Strickland*.

In addition to finding that the state post-conviction court's decision was contrary to the law clearly established by this Court in *Ake*, 470 U.S. 68 (*see* Argument I, *supra*), the court of appeals found that the post-conviction court's decision regarding trial counsel's performance was "unreasonable under any reading of Strickland." Pet. App. A-27. The court of appeals's unanimous decision was rendered after a meticulous review of the voluminous, fact-based record, which comprises ten volumes of excerpts of record totaling 2,996 pages, as well as over 9,000 pages of a state court and habeas record, painstakingly catalogued the important, readily-available, non-cumulative mitigation that Jones's trial counsel missed. As part of its *Strickland* analysis, the court also found the district court's application of a causal-nexus requirement

between the new mitigation and crimes was clearly erroneous, not only because of this Court's prohibition against such a requirement in *Tennard v. Dretke*, 542 U.S. 274, 287 (2004), but also because the circumstances surrounding the crime in this case are a direct consequence of Jones's "abused and unfortunate past." Pet. App. A-39.

What is more, the court of appeals noted that while each of the specific instances of ineffective assistance were deficient and prejudicial standing alone, when considered together, "there can be no question that the deficiencies were fatal." Pet. App. A-41. Given the court's detailed review of each claim and the aggregation of these deficiencies, there is nothing uncommon about its decision that trial counsel's performance fell below the requirements of the Sixth Amendment and did not fit any proper reading of *Strickland*.

Petitioner argues that the court of appeals's unanimous panel decision "fail[ed] to defer to the state court's resolution of Jones' ineffective assistance claims." Pet. at 18. This statement is without merit because the state post-conviction court's summary decision did not explain the rationale it applied in denying Jones's ineffective assistance claims. Pet. App. C-45. Therefore, as the district court correctly observed, an independent review of the record before the state post conviction court, as well as de novo review of the new evidence presented at the federal evidentiary hearing, was required to determine whether the post-conviction court applied *Strickland* to the facts of this case in an objectively unreasonable manner. Pet. App.

C-45. When a state court's decision depends on "an antecedent unreasonable application of federal law," § 2254(d)(1) is satisfied and the federal court must decide the claim "without the deference AEDPA otherwise requires." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).

Therefore, because the state post-conviction court made only *Strickland* deficiency findings, the court of appeals correctly applied a de novo standard of review to evaluate the *Strickland* prejudice prong of Jones's ineffective assistance of counsel claim. Pet. App. A-38.

Petitioner's attempts to manufacture "new rules" from the court of appeals's unanimous decision are an attempt to show that the court erred in its *Strickland* analysis and should be disregarded as "red herrings." For example, the court of appeals did not make a "new rule" that every family member must be interviewed as part of a mitigation investigation. Pet. at 19. Rather, the decision used trial counsel's failure to interview Jones's sister to illustrate his failure to conduct a reasonable mitigation investigation and present sufficient witnesses and evidence at sentencing. Pet. App. A-34-35 (citing *Wiggins*, 539 U.S. at 524). At sentencing, only Randy, Jones's second step-father testified to mitigation. His testimony omitted crucial mitigating evidence provided by Jones's sister Carrie: that Randy himself was severely abusive.[11] The court of appeals found that as a

11. Carrie's declaration revealed that:

"Randy: (1) on two occasions held a gun to his head and threatened to kill himself, (2) was both

(Cont'd)

result "the sentencing court was left with the erroneous belief that [Jones] lived in a loving and supportive home" past age six, however, "nothing could be further from the truth." Pet. App. A-39. When confronted with Carrie's information, Randy admitted his past abuse – information not known to the trial or post-conviction courts. Pet. App. A-36-37. Thus, not only did Jones, his mother, and his sister endure physical and mental abuse from his first step-father, the same abuse continued throughout the rest of his childhood at the hands of trial counsel's primary mitigation witness, Jones's second step-father. Further, the court of appeals properly found that the district court's rejection of the new mitigation evidence, because of the family's failure[12] to "tell" trial counsel about it, violated *Rompilla*, 545 U.S. at 383, and *Wiggins*, 539 U.S. at 527, which place the burden on trial counsel to perform an adequate mitigation investigation, particularly where, as here, the "known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527.

(Cont'd)

> physically and verbally abusive to Danny and [Carrie], and (3) abused their mother so severely that when Danny was only seven or eight years old he threatened to kill Randy if Randy did not stop abusing [his mother]."

Pet. App. A-36.

12. There is no evidence in the record that Carrie was uncooperative. Instead, the record shows that Carrie was readily available, and as soon as she was contacted, she submitted a declaration that corroborated, among other things, Randy's abuse. Pet. App. A-36-37.

Another "red herring" is Petitioner's claim that the court of appeals misapplied *Strickland* by "considering only newly proffered mitigation evidence, without considering rebuttal evidence and evidence of aggravating circumstances, in determining the prejudice analysis." Pet. at ii. As discussed above, because the post-conviction court only made findings regarding *Strickland's* performance prong,[13] the prejudice prong was properly analyzed de novo.[14] *See Rompilla*, 545 U.S. at 390; *Wiggins*, 539 U.S. at 534. Using that standard, the court of appeals "reweighed the evidence in aggravation against the totality of available mitigating evidence," Pet. App. A-19, and found that "[g]iven the record," *Strickland* prejudice was established where Jones's trial counsel was ineffective for failing to obtain partisan expert witnesses and neuropsychological testing.[15] Pet. App. A-33.

13. And conversely, the district court made findings only as to *Strickland's* prejudice prong. Pet. App. C-45.

14. Petitioner also argues that AEDPA's mandate requiring deference to the state post-conviction court's resolution of Jones's claims is "super-enhanced" because the trial judge and post-conviction judge were one and the same. Pet. at 23. Setting aside the fact that Petitioner cites dicta of *Schriro v. Landrigan*, 550 U.S. 465, 476 (2007), Petitioner's argument also fails because, in this case, the post-conviction court not only failed to make a prejudice finding, it also failed to provide the rationale it used in applying *Strickland* to the facts of its case.

15. Further, in finding no prejudice from counsel's deficiencies, the district court again added to the complexity of review of this case by applying the requirement that Jones was required to show a "causal connection between the crimes and

(Cont'd)

Similarly, there is no merit to Petitioner's complaint that the court of appeals did not consider rebuttal evidence and aggravating circumstances the State would have presented if trial counsel presented the mitigation evidence proffered at the evidentiary hearing. Pet. at 21-22. Nothing indicates the court of appeals avoided its duty to take into account the aggravating factors found by the sentencing judge when assessing *Strickland's* prejudice prong. To the contrary, the court of appeals applied the proper standard of review: whether a reasonable probability existed that an objective fact-finder in a state sentencing hearing would have concluded, based on the evidence presented, that diagnoses existed that could explain the nature of Jones's mental impairments in a manner that mitigated his culpability for the crimes. Pet. App. A-28-29.

Likewise, Petitioner's blatant attempt to tar the court of appeals's well-reasoned decision in this specific, fact-driven case, by spending over two pages of its petition discussing Judge Kozinski's dissent in *Pinholster*, which raises entirely different issues, should

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(Cont'd)

the new allegations of abuse." Pet. App. C-55-56. This Court, however, has made clear that this "causal nexus" requirement is unconstitutional and without precedent. *See Smith v. Texas*, 543 U.S. 37, 45 (2004) (per curiam); *Tennard*, 542 U.S. at 284-85. The court of appeals did not require Jones to show a "causal nexus" before finding proffered evidence mitigating, correcting the district court's error. Again, the court of appeals also found the district court's findings clearly erroneous because expert witness testimony found a direct connection between Jones's mental health diagnoses, including brain damage, and the crime. Pet. App. A-39-40.

be rejected outright. Pet. at 23-25. Specifically, the *Pinsholster* dissent attacks using evidence not presented in state courts and retroactively applying standards for determining the effectiveness of counsel. *Pinholster v. Ayers*, 590 F.3d 651, 685 (9th Cir. 2004) (Kozinski, J., dissenting), cert. granted *Cullen v. Pinholster*, __ S. Ct. __, 2010 WL 887247 (June 14, 2010). Neither of these issues arise in this case. *See e.g.*, Pet. App. A-19-21 (specifically discussing standards in effect at time of trial). Despite these and other differences, Petitioner characterizes this, and the other cases cited by the dissent in *Pinholster*, as a rash of failed deference. *Strickland* claims are decided on a case-by-case basis. There is no reason to perform surgery with a shovel by treating these cases as analogous. Because the facts are inapposite and the court of appeals carefully outlined and used the proper standards of deference, *Pinholster* is not relevant here.

In its discussion of *Strickland's* prejudice prong requirements, the court of appeals's decision stated that the court's review must "reweigh the evidence in aggravation against the totality of available mitigating evidence." Pet. App. A-19. Again, later in the decision, the court noted that the discovery of not only "all reasonably available mitigating evidence" but also "evidence *to rebut any aggravating evidence that may be introduced by the prosecutor*" was required. Pet. App. A-34 (emphasis added). In finding prejudice, the court of appeals noted, "Here, . . . , [a] more complete presentation, including even a fraction of the details [Petitioner] now alleges, could have made a difference." Pet. App. A-41 (citations and internal quotations omitted).

Petitioner's final attempt to elevate this unremarkable ineffective assistance of counsel case to certiorari-worthy status likewise falls flat. Petitioner argues that the court of appeals improperly ruled that a district court should not evaluate the credibility of expert witnesses who testify at an ineffective assistance of counsel hearing regarding evidence a defendant claims should have been presented at sentencing.[16] Pet. at 25-26. At first blush, this argument sounds reasonable but closer look reveals that Petitioner is simply asking this Court to correct the factual findings *he* perceives as erroneous. *See* S. Ct. R. 10. What Petitioner fails to recognize is that an appellate court is not confined to reviewing the four corners of the district court opinion, but rather the entire district court record; and the findings by the district court must be fairly supported by the record as a whole. *See Gypsum Co.*, 333 U.S. at 395.

16. In support of this argument, Petitioner cites *Knowles v. Mirzayance*, __ U.S. __, 129 S. Ct. 1411 (2009), a case in which this Court reversed a court of appeals decision granting habeas relief on an ineffective assistance of counsel claim. The ineffective assistance issue central to *Knowles* was whether trial counsel had made a carefully reasoned decision to not go forward with a not-guilty-by-reason-of-insanity plea in a bifurcated trial following a first-degree murder conviction of a defendant who confessed to killing his cousin. Without even referring to the magistrate judge's finding, the court of appeals reached the opposite decision. This court noted that the court of appeals erred by failing to mention or apply the clearly-erroneous standard of review to the magistrate judge's evidentiary hearing findings. *Id.* at 1421. *Knowles* is inapposite to the facts and circumstances of this case as it did not involve the presentation of mitigation evidence, and, in this case, the court of appeals delineated and applied the clear error standard of review.

Under *Strickland's* prejudice analysis, the question in this case was whether, based upon totality of available evidence (including the new evidence adduced at the evidentiary hearing) a reasonable probability existed that an objective fact-finder would have concluded that the outcome at sentencing would have been different. *See Strickland*, 466 U.S. at 694. As this Court instructed in *Wong v. Belmontes*, to establish prejudice, a petitioner "must show a reasonable probability that the jury would have rejected a capital sentence after it weighed the entire body of mitigating evidence . . . against the entire body of aggravating evidence." __ U.S. __, 130 S. Ct. at 386; *see also Wiggins*, 539 U.S. at 534 (prejudice is weighed by "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence"). In finding *Strickland* prejudice, the court of appeals made a detailed examination of a complex, voluminous record including over 540 pages of transcripts from the district court evidentiary hearing.

In its review of trial counsel's performance, based upon the evidence of mitigation presented at the evidentiary hearing, the court of appeals determined that the district court's findings in this case were clearly erroneous. A clearly erroneous finding is one that leaves the reviewing court with the "firm and definite conviction that a mistake has occurred." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). In this case, the court of appeals used the methodology outlined by this Court to determine whether the district court's findings were clearly erroneous. In *Amadeo v. Zant*, 486 U.S. 214 (1988), this Court reversed an Eleventh Circuit decision because the court had "acknowledged that the District Court had found . . . facts, [b]ut without

examining the record or discussing its obligations under Rule 52(a), the court simply expressed disagreement." *Id.* at 223. In this case, by contrast, the court of appeals examined the record extensively, explicitly acknowledged and obeyed the proper appellate standards by detailing the portions of the record in which the district court made clearly erroneous findings, and explained this work in the opinion.

The unanimous panel carefully reviewed the totality of the mitigating evidence and found that:

> [Jones] presented experts at the evidentiary hearing who testified to his extensive history of physical, mental, and sexual abuse, numerous head injuries resulting in unconsciousness, and a lifetime of sub-stance abuse. They diagnosed Danny with PTSD, AD/HD, cognitive dysfunction, and an affective mood disorder. Finally, they explained that his substance addictions likely stemmed from a genetic predisposition and his attempts to self-medicate.

Pet. App. A-29. The court of appeals compared this evidence to Dr. Potts's equivocal report and found that "the sentencing judge was given a short and conditional report lacking any specific diagnoses." Pet. App. A-33. Following previous decisions in *Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008) ("*Correll II*"), *cert. denied*, 129 S. Ct. 903 (2009), *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007), and *Bean v. Calderon*, 163 F.3d 1073 (9th Cir. 1998), the court of appeals reiterated "that merely skimming the surface on important issues does not make

an in-depth discussion cumulative." Pet. App. A-30. The court of appeals set forth Dr. Stewart's extensive diagnoses and detailed explanation of Jones's unfortunate childhood, and cited this Court's decision in *Boyde v. California*, 494 U.S. 370, 382 (1990), to show how the information would have shown at a sentencing that Jones was "less culpable." Pet. App. A-31-33. The court of appeals found that:

> [Jones] presented the persuasive testimony of numerous experts that he suffered from serious mental defects, was viciously abused throughout his childhood, and was driven to become a polysubstance abuser in order to self-medicate for the trauma he experienced and the defects he had.

Pet. App. A-33.

Thus, the court of appeals did not fail to defer to the district court finding that Jones was not prejudiced by counsel's failures; rather, the panel found the district court's conclusion was erroneous and that the evidence presented by Jones "sufficiently undermined [the panel's] confidence in the capital sentencing decision to establish *Strickland* prejudice." Pet. App. A-33. In fact:

> The district court's conclusion that [Jones] did not suffer prejudice because the neutral, court-appointed psychologist's testimony was the most persuasive testimony presented only highlights the greater potential for

> presenting effective mitigation evidence from a psychologist appointed to assist the defendant.

Pet. App. A-33.

Finally, the court of appeals found the district court's rejection of Claims O and P, because the proffered mitigation evidence had no causal nexus or relationship to the crime, to be clearly erroneous. Pet. App. A-39-40.

The statement[17] that Petitioner takes issue with does not run afoul of this Court's precedent and makes an apt point: when determining whether there is sufficient evidence to undermine confidence in the outcome of a proceeding, the court should not look for a "conclusive" answer by deciding which expert is the most credible. This is especially so in the context of penalty-phase *Strickland* claims, because the defendant has a right to present all mitigating evidence, not merely the most convincing. *See Porter v. McCollum*, __ U.S. __, 130 S. Ct. 447, 454 (2009) (per curiam) (noting that even disputed expert testimony is relevant to sentencing because *Eddings* [*v. Okla.*, 455 U.S. 104, 112 (1982)] commands "the sentencer in capital cases must be permitted to consider any relevant mitigating factor").

Federal courts are charged with deciding whether confidence in the outcome can be sufficiently undermined, not whether a capital defendant can

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17. "We have held that a district court should not independently evaluate which expert was most believable or try to find a definitive diagnosis. . . ." Pet. App. A-28.

unquestionably prove mental impairment. *See Correll II*, 539 F.3d at 952 n. 6. Therefore, although the district court may evaluate the expert evidence, it is error to impermissibly omit evidence that is relevant to mitigation by insisting upon a "conclusive" or "confirmed" answer. *Id.* The sentencing phase of capital trials is different from the guilt phase. *Porter*, __ U.S. __, 130 S. Ct. at 454. At sentencing, the defendant has a right to present all relevant mitigating evidence, not just the evidence that would be convincing at the guilt phase. *Id.* For this reason, it is improper to *entirely* discount potentially mitigating evidence (including expert opinion, even where the correctness of those opinions is disputed). *See id.* In the same way, it is not proper to require an expert to definitively prove that the defendant's alleged mental impairment actually impaired him at the time of the offense. *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995).

Here, the court of appeals faithfully followed *Porter* and found that the district court erred by *entirely* discounting evidence that was relevant to mitigation. The decision specifically emphasized that the district court should not have looked for a definitive answer. The relevant language reads, "It was improper for the district court to . . . determine who was the most credible and whether [Jones] presented 'evidence *confirming* that [he] suffers from neurological damage.'" Pet. App. A-28 (emphasis in original). This emphasis indicates that this statement does not amount to the court of appeals forbidding all credibility determinations. Instead, as one part of its determination that the district court clearly erred, the court of appeals insisted that the district court should not have entirely discounted

relevant mitigating evidence, but instead should have taken it into proper account in its analysis of *Strickland* prejudice. Pet. App. A-28 (quoting *Correll II*, 539 F.3d at 952 n. 6).

These instances, as well as the other detailed evidence reflected in the court of appeals's decision, are simply part of the court's clear-error review. Pet. App. A-17. The court applied the appropriate standard and found numerous reasons that the district court erred; it did not simply rely on a determination that the district court impermissibly weighed expert testimony.

In relation to the detailed facts that the court of appeals recited in support of its decision that the district court findings were clearly erroneous, the discussions of the credibility of the expert witnesses command little attention. For example, the district court found that Dr. Stewart had only presented evidence that Jones had suffered through a traumatic event, and that the doctor had not shown that Jones re-experienced previous trauma at the time of the offense. Pet. App. C-18. As the court of appeals noted, however, Dr. Stewart actually testified about other components of a Post-Traumatic Stress Disorder diagnoses. Pet. App. A-11-12. Specifically, he testified that the most common presentation is exaggerated responses to challenges. Pet. App. A-12. The court's decision cited evidence detailing exactly how the district court's findings (that there is no reasonable probability this evidence of Post-Traumatic Stress Disorder could have changed the sentencing outcome) are clearly erroneous. Although the court of appeals noted that the district court, when reviewing the prejudice prong of *Strickland*, should not

have looked for a "conclusive answer" and dismissed the testimony of Jones's experts, the court also went beyond that to detail other ways in which the district court's findings were clearly erroneous.

For example, the court of appeals explained in detail, with citations to the record, the reasons why "the district court's conclusion that Dr. Potts was a 'de facto defense expert' was clearly erroneous." Pet. App. A-23. The court of appeals specifically detailed its reasoning for finding clear error based not only upon its application of *Ake* (see Argument I, *supra*), but also upon Dr. Potts's repeated testimony that he was only a neutral expert, the lack of time trial counsel spent with him before his testimony at sentencing (two hours), the paucity of background materials given to him (31 pages), and the fact that trial counsel ignored his advice to arrange neurological and neuropsychological testing until after he testified. Pet. App. A-23-26.

The court of appeals's decision fits what this Court has called a good example of clear error review: it examined the record, discussed the court's obligations under the appropriate standard of review, and did more than simply disagree with the district court. *See Amadeo*, 486 U.S. at 223.

Conclusion

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED NOVEMBER 5, 2009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-99000

D.C. No. CV-01-00384-SRB
District of Arizona, Phoenix

DANNY LEE JONES,

Petitioner-Appellant,

v.

DORA B. SCHRIRO,

Respondent-Appellee.

ORDER

Before: THOMAS, Circuit Judge and En Banc Coordinator.

A *sua sponte* request for a vote on whether to rehear this case *en banc* has been received. Pursuant to General Order 5.4(c)(3), the parties are requested to file simultaneous briefs setting forth their respective positions as to whether or not this petition for review should be reheard *en banc*. The briefs are not to exceed 15 pages and are to be filed within 21 days of the filing date of this order. Parties who are registered for ECF must file the brief electronically without submission of paper copies. Parties who are not registered ECF filers must file the original brief plus 50 paper copies.

APPENDIX B – DECLARATION OF PABLO STEWART, M.D. DATED SEPTEMBER 10, 2002

I, Pablo Stewart, M.D., declare as follows:

1. I am a physician licensed to practice in California, with a specialty in clinical and forensic psychiatry. I have extensive clinical, research, and academic experience in the diagnosis, treatment, and prevention of substance abuse and related disorders, including the management of patients with dual diagnoses and the use of psychotropic medication and diagnostic, treatment, and community care programs for persons with Post Traumatic Stress Disorder.

2. I have written and published numerous articles in peer review journals on topics that include dual diagnoses, psychopharmacology and the treatment of psychotic disorders and substance abuse. I have designed and taught courses on protocols for identifying and treating psychiatric patients with substance abuse histories and have supervised psychiatric residents in teaching hospitals. I have worked closely with local and state governmental bodies in designing and presenting educational programs about psychiatry, substance abuse, and preventative medicine.

3 I received my Bachelor of Science from the United States Naval Academy, Annapolis, Maryland, in 1973, with a major in chemistry. I received my Doctor of Medicine Degree from the University of California, San Francisco, School of Medicine in 1982.

Appendix B

4. I served as a Physician Specialist to the Westside Crisis Center, San Francisco Ca., from 1984 to 1987 and the Mission Mental Health Crisis Center from 1983 to 1984. I have served as Medical Director of the Comprehensive Homeless Center, Department of Veterans Affairs Medical Center in San Francisco CA; where I had overall responsibility for the medical and psychiatric services at the Homeless Center; Chief of the Intensive Psychiatric Community Care Program, Department of Veterans Affairs Medical Center in San Francisco, CA; Chief of the Substance Abuse Inpatient Unit, Department of Veterans Affairs Medical Center in San Francisco CA, where I had overall clinical and administrative responsibilities for the unit; and Psychiatrist at the Substance Abuse Inpatient Unit, where I provided consultation to the Medical/Surgical Units regarding patients with substance abuse issues. I am currently the Chief of Psychiatric Services at Haight Ashbury Free Clinic in San Francisco, California, a position I have held since 1991.

5. In addition to my clinical and teaching responsibilities, I have experience in forensic psychiatry. From 1988 to 1989, I was Director of Forensic Psychiatric Services for the City and County of San Francisco where I had administrative and clinical responsibilities for psychiatric services provided to the inmate population of San Francisco. My duties included direct clinical and administrative responsibility for the Jail Psychiatric Services and the Forensic Unit

at San Francisco General Hospital. From 1986 to 1990, I was Senior Attending Psychiatrist, Forensic Unit, University of California, San Francisco General Hospital, where I was responsible for a twelve (12) bed maximum security psychiatric ward. One of my duties was advising the San Francisco City Attorney on issues pertaining to forensic psychiatry.

6. I also serve as medical and psychiatric consultant to the monitors of the agreement between the United States and Georgia to improve the quality of juvenile justice facilities, critical mental health, medical and educational services, and treatment programs. The monitor is the Institute of Crime, Justice and Corrections at George Washington University in Washington, D.C. I have qualified and testified as a psychiatric expert witness in federal court cases regarding the implementation of constitutionally mandated psychiatric care to California's inmate population at different maximum security and psychiatric care facilities. I serve as a Technical Assistance Consultant to the Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration, Department of Health and Human Services; and Psychiatric Consultant to the San Francisco Drug Court.

7. In 1985, I received the Mead-Johnson American Psychiatric Association Fellowship for demonstrated commitment to public sector psychiatry and was selected as the Outstanding Psychiatric Resident by the graduating class of the

University of California, San Francisco, School of Medicine. In 1985-1986, I was the Chief Resident, Department of Psychiatry, University of California San Francisco General Hospital and had direct clinical supervision of seven psychiatric residents and three to six medical students.

8. I have served as an Examiner for the American Board of Psychiatry and Neurology and am a Diplomat of the same Board. I am active in several professional associations and have served as the President, Secretary-Treasurer and Councilor-at-large of the Alumni-Faculty Association, University of California, San Francisco, School of Medicine; Vice President of the Northern California Area, Alumni-Faculty Association, University of California, San Francisco; and Associate Clinical Member of the American Group Psychotherapy Association.

9. I have held academic appointments as Associate Clinical Professor, Assistant Clinical Professor, and Clinical Instructor in the Department of Psychiatry, University of California, San Francisco, School of Medicine, since 1989. I received the Henry J. Kaiser Award for Excellence in Teaching in 1987 and was selected by the graduating class of the University of California, San Francisco, School of Medicine as one of the top ten faculty members for the academic year 1994 - 1995, 1990 - 1991, and 1988 - 1989. I designed, planned and taught "Drug and Alcohol Abuse" and "Alcoholism," one unit courses covering major aspects of drug and alcohol abuse;

supervised fourth-year medical students in the care of dual diagnostic patients at the Psychiatric Continuity Clinic, Haight Ashbury Free Clinic; facilitated a weekly psychiatric intern seminar on "Psychiatric Aspects of Medicine"; and lectured on addictionology and substance abuse to the School of Pharmacy, UCSF.

10. At the request of counsel for Danny Lee Jones, ("Danny"), I conducted a psychiatric evaluation of Danny in order to determine and identify the significant factors that influenced his behavior and cognitive functioning at the time of the offense and over the course of his life. This evaluation included a mental status examination, a structured psychiatric diagnostic interview, and a lengthy open-ended interview designed to elicit a medical and psychiatric history as well as any evidence of malingering.

11. I interviewed Danny at the Arizona Department of Corrections, Special Management Unit II (SMU II), the facility for death sentenced prisoners, on March 18, 2002; his mother, Peggy Jones; and his step-father Randy Jones. I also reviewed and relied on the reports of Drs. Shoba Sreenivasan and David Foy.

12. I reviewed the relevant trial, sentencing and post-conviction transcripts. I have also reviewed the Arizona Supreme Court Opinion issued in this case, as well as the presentence report. In addition, I reviewed contemporaneous documentation concerning Danny's social and

medical history, including his school, medical, military, criminal, and incarceration records. I also reviewed numerous investigative reports and declarations of family members that describe Danny, his parents, and their interfamilial dynamics. These are the kinds of materials routinely relied upon by members of my profession in reaching their opinions.

13. My interview of Danny was conducted in a private interview room. Prison officials required that I wear a padded vest and safety goggles as routine safety measures required for all contact visits with all death sentenced prisoners, even though Danny has demonstrated no signs of aggressive or disruptive behavior during visits.

14. Danny appeared his stated age of 37. He was well groomed, was dressed in a prison uniform, and was cooperative throughout the interview. He is slightly overweight and average in height (5'9").

BACKGROUND AND FACTUAL INFORMATION

Peggy Jones' (Danny's Mother) Childhood

15. Peggy (Goodson) Jones is Danny's mother. She was born in North Carolina in 1949. Her father left her mother when Peggy was five (5) months old and completely disappeared from her life when she was nine (9) years old (only later to appear in Peggy's life when she was a young adult). Peggy's mother and grandmother worked to

support the family. When Peggy was four (4) years old her mother married Enloe Schuler. Schuler was not a good provider and therefore, Peggy's mother continued to support the family. When Peggy was about nine (9) years old, Schuler began raping Peggy. This continued for two (2) years until Peggy moved in with her aunt to escape her stepfather.

16. Peggy was always a sickly child and was also underweight. She experienced "fits" or seizure-like attacks which were never diagnosed. Because of the stresses and responsibilities at home, Peggy was not able to complete school and by age fourteen (14) she was working full-time.

Jimmy Beck (Danny's biological father)

17. Peggy met Jimmy Beck (Beck), Danny's biological father when she was thirteen (13) years old and he was eighteen (18) years old. Peggy married Beck, when she was fourteen (14) years old, to get out of her house. Beck was an alcoholic, a thief, a gambler and unable to maintain steady employment. In addition, Beck had a learning disability, as he was unable to pass in school. Jimmie Beck's parents were first cousins. His mother was an alcoholic and drank until she passed out every night. Beck's mother also had "nervous breakdowns" and was hospitalized several times for them.

18. For Peggy, life with Beck was not what she hoped. Due to his drinking, gambling,

and stealing, Peggy was forced to support the family. Soon after they were married Beck became violent. He raped Peggy repeatedly and also forced Peggy to have sex with his friends. When she refused, he would hit her. Beck's physical and emotional abuse included berating Peggy, pushing her against walls and slapping and hitting her with his fists. Peggy suffered broken bones at Beck's hands.

Chrome Exposure, Malnutrition and Pregnancy

19. Peggy began working at a chrome-plating factory when she was fourteen (14) years old. At this factory she was required to stand for eight (8) to ten (10) hours a day working off the conveyor belt. Her job was to take the freshly chrome-dipped hubcaps off the conveyor belt, sand, clean and buff them. She was given only goggles and cotton gloves for protection from the highly caustic chemicals. The turnover rate at the factory was high because of the employees succumbing to the overpowering odors caused by the cleaning fluid and other chemicals used in the chroming process. Peggy was sick almost every day. A month after starting work at the chrome-plating factory, Peggy became pregnant with Danny. Peggy worked at this factory for most of her pregnancy.

20. Due to her poverty and nausea induced by her job, Peggy suffered from malnutrition. A typical day of eating consisted of a pot of coffee, several packs of cigarettes and mayonnaise and bread sandwiches, since, aside

from beer, that was often the only food in their refrigerator. During her pregnancy Peggy was severely malnourished and only weighed ninety-eight (98) pounds. She never ate breakfast or dinner. Shortly before Danny was born, Peggy got a job as a waitress at a restaurant and she was able to eat a free lunch there - her only real food of the day.

21. The physical abuse from Beck did not subside while she was pregnant with Danny. Beck continued to beat Peggy. In one instance, after a beating from Beck, when she was three (3) months pregnant, she began bleeding and was told by her doctor that her placenta was separating. Two weeks before Danny was born Beck pushed Peggy down the stairs. As she laid at the bottom of the stairs, Beck ordered her to get up. When she could not get up, Beck punched her in the face, kicked her in the stomach and left. This incident left her with a black eye and vaginal bleeding.

Danny's Birth

22. Peggy's labor and delivery was extremely complicated. The doctor attempted to give Peggy an epidural (an injection given in the epidural space to decrease sensation to the lower extremities of the body), but missed. Peggy was in labor for forty-eight (48) hours and was in and out of consciousness throughout. Moreover, four (4) hours before Danny was born, Peggy's heart stopped. In addition Danny was in breech position (feet first) and the umbilical cord was wrapped

around his neck constricting his airflow. The doctor used forceps to turn Danny around and finally pull him out of the birth canal. Danny was deprived of oxygen at least twice during birth: once when Peggy's heart stopped, and then again while the cord was wrapped around his neck. Once it was all over, Danny was bruised on both temples, his jaw, the base of his neck, the back of his head, below his elbows and knees, and along his spine. Danny was given pain medication.

23. It was clear that Beck did not want Danny. First he proposed that Peggy leave Danny with her mother and move away with him. Then Beck's mother called Peggy, claiming that she could sell Danny for $5,000 and she would split the money with her. She had already found a buyer. Due to these pressures, Peggy left Beck soon after Danny's birth.

Richard Eland (Danny's first step-father)

24. When Danny was about one-and-a-half (1½) years old, and Peggy was about seventeen (17) years old, she met Richard Eland ("Eland"). Approximately a year later they were married. About six (6) months into the marriage, Eland began drinking heavily and using drugs. When Peggy turned eighteen (18) years old, Eland threw her a birthday party. During the party Peggy jokingly teased Eland about something. Eland took it the wrong way and picked Peggy up by the throat and pinned her against the wall until she started to turn blue. Two of his friends

had to pull Eland away. A few months later, when Peggy was eight (8) months pregnant with Carrie, Eland's abuse began again without end. Thereafter, Eland often beat Peggy, breaking her jaw twice. He even shot at her once. Danny was often a witness to these incidents. Right after Eland shot Peggy, she walked into Danny's room and found him talking to an imaginary friend. Eland's abuse was not limited to Peggy.

25. When Danny was about three-and-a-half (3½) years old, Carrie, Danny's sister, was born. Eland was the disciplinarian of the family. As punishment, Eland would often make Danny sit in a highchair for long periods of time. When Peggy finally took Danny out, Eland knocked Peggy across the room for doing it. In order to punish Danny, Eland would make him stand in a corner for prolonged periods, hit him with a wooden spoon and hit him hard on the back of the head and ear. Danny often had earaches because of this. One time Eland made Danny sit there for three-and-a-half (3½) hours.

26. As Eland could not keep a job, he often watched the children while Peggy worked. On one of these occasions, Eland put a piece of soap in Danny's mouth, taped his mouth shut with duct tape, and locked him in the closet where his mother found him when she came home.

27. When Danny was about five-and-a-half (5½) years old, Peggy found Danny barely conscious lying underneath a slide attached to a

swing set. Eland was standing over him. Although Eland denied it, Peggy suspected Eland had hurt Danny, since Danny had never fallen off the slide before. Danny's face was all red and he threw up. Peggy wanted to take Danny to the hospital but Eland did not let her.

28. Danny tried to protect his mother. During one incident, Eland was in the garage working with an electric saw. Eland held the saw to Peggy's throat and said "[i]t would be so easy to cut your jugular." Danny tried to help Peggy but she ordered him inside the house. Once she got away from Eland, she searched for Danny. Peggy found Danny hidden under the kitchen table shaking and crying. He told Peggy, "Mommy, I thought you were dead." Danny witnessed so many incidents that finally when he was about four (4) years old, Danny told Eland "[y]ou hit my mom one more time and I'm gonna kill you."

29. By the time Danny started first grade, Eland was gone. Although Peggy realized Eland had caused some trauma to her children, she did not realize the impact of it until years later. When Danny was about nine (9) years old, Eland committed suicide. Peggy told her children about the suicide. Shortly after that, the school called Peggy to inform her that Carrie was biting other children hard enough to take chunks of flesh off. Peggy took both Danny and Carrie to a counselor. During one of the sessions, the counselor gave Carrie a doll and asked her "[i]f this were [Eland], what would you do to him?"

Carrie took the doll and banged his head repeatedly on the edge of the table, tore his arms and legs off and said "I hate him. He was mean to my Mommy. And he died and I did not get to tell him." Carrie was at most two (2) years old when Eland and Peggy separated and she did not experience the violence to the extent Danny did. Danny, unlike his sister, has not been able to express his anger towards Eland.

Randy Jones (Danny's Second Step-father)

30. Peggy married Randy Jones ("Randy") in 1972, when Danny was about eight (8) years old. Randy was a deputy sheriff and worked the night shift. Randy had recently returned from the Republic of Vietnam, where he served for a year with the Marines. For Danny, their marriage was sudden. Randy was just this man that all of a sudden appeared in his life and then the next thing Danny realized, Randy and Peggy were dating and then he moved in. Danny soon realized that Randy was just another version of Eland.

31. Life with Randy was not any better than with Peggy's other husbands. Randy was a heavy drinker. In addition, Randy was controlling, arrogant, sarcastic and believed he was superior to everyone else and was a racist. For example, Peggy's sister is married to a Hispanic man, Mario. Although Mario has been a member of their family for twenty-seven (27) years, Randy has not spoken one word to him nor has he ever acknowledged Mario's presence at any family

gathering.

32. Randy controlled Peggy and the children. Peggy was not allowed to have a job, friends of her own, and had to follow Randy's "rules", no matter how ridiculous. Randy would often drop by the house unexpectedly while he was on patrol to make sure everyone was following the "rules". Peggy had to go behind Randy's back and break some of the "rules" so that the children would have some freedom. However, if Randy found out there would be serious consequences. Randy's control was not all in the form of psychological abuse, he would also hit Peggy and the children. This would occur frequently when he was drinking, which he did all the time.

33. Randy was manipulative and controlling even when Peggy tried to leave him. Once he asked Danny and Carrie to decide if they wanted him to leave. The children voted to let Randy stay, because they thought that's what Peggy really wanted. In addition, at least two (2) times, Randy threatened to kill himself. Once right in front of the children he held a gun to his head and threatened to pull the trigger. A second time Randy and Peggy were in the hallway when Carrie saw Randy with a gun to his head and Peggy on her knees, begging him not to do it.

34. The environment at home was very tense. Randy kept loaded guns all over the house (on the coffee table, refrigerator and under the bed). Randy would often sit in front of the

television pulling the trigger to one of his guns, over and over and over again. This was done, ostensibly, to "break-in" these weapons, however this is another example of his not-so-subtle method of controlling and intimidating his family. Danny knew better than to touch the guns, which were never locked, "the belt was the safety." Randy made sure Carrie and Danny knew that if they ever touched the guns they would be beaten.

35. Randy was not the father Danny was searching for. Randy berated Danny and told him he was no good and that he would grow up to be like his father, Jimmie Beck, and end up in jail. Randy made Danny believe that everything that went wrong in the family was Danny's fault. Danny was to blame for his parents' fights, the fights his parents had with his sister, the family's financial problems, and his mother's medical problems. (When Danny was in grammar school Peggy was in and out of the hospital with uterine tumors and lumps in her breasts.)

36. Randy played military-style "head-games" on the children and ran drills. He would make Danny and Carrie "line up" in the living room then gave them a set amount of time, in seconds, to run to their rooms, change into their pajamas and return to the same spot in the living room. Randy made them repeat this over and over and over again, changing clothes, back and forth many times in a row. There were lectures that lasted hours, where Danny and Carrie were not allowed to move. In addition, their rooms were

inspected daily and if they were not to Randy's liking, Danny and Carrie would be punished.

37. Randy was also very manipulative. He would punish both Danny and Carrie in an abusive manner (like punching Danny in the stomach so hard that it made him double over or holding Carrie against the wall heater until she was burnt). However, when Danny or Carrie told Peggy about the abuse, Randy accused them of lying and they would then be punished again for lying. Peggy rarely believed them. Danny and Carrie soon learned not to tell. As part of Randy's punishments, he would hit Danny and Carrie with a leather belt or the buckle. Danny and Carrie never knew which end they were going to be hit with. He would prolong the whipping by taking his time picking out the belt in front of the children. Carrie remembered one buckle in particular that had several large metal rings.

38. Randy's punishments and rules grew more bizarre as the children grew older. One time, Carrie colored in Danny's book, and to punish Carrie for what she did, Randy made Danny whip Carrie with the belt. Danny did not want to do it but Randy made him. Another example of Randy's bizarre, torturous behavior is when he made Carrie stay up for three (3) nights in a row in her room, naked. Randy allowed her to sit on the bed but not lay down. He would go into her room periodically during the night to make sure she was awake.

39. This was one of several incidents that either had a sexual theme, or was sexually inappropriate. For example, at some point Carrie wanted to be a model and talked about it with both Randy and Peggy. After the discussion, and after Peggy had left the house to run an errand, Randy suggested that Carrie model for him while he took pictures. This "felt wrong" to Carrie and she refused. However, Randy's inappropriate comments about Carrie's appearance continued and he told her she looked like a prostitute, and commented on her nipples, and even to pulled down her top to expose her breasts.

40. It was not unusual that all three, Danny, Carrie and Peggy, would be "grounded" by Randy. Randy was just as abusive and demeaning to Peggy, as he was to Danny and Carrie, often times in front of them. He hit her, yelled at her, told her she was no good and that no one would want her. The abuse got so unbearable for Danny that when he was just seven (7) or eight (8) years old, he decided that he was going to kill Randy if he did not stop hurting Peggy. This was not the last time Danny felt he needed to protect his mother against Randy. When Danny was about fourteen (14) years old, Randy was yelling at Peggy and Danny heard Randy hit Peggy. Danny grabbed a baseball bat, determined to protect his mother. He went into their bedroom but could not determine if Peggy had been hit or not, so he retreated.

Appendix B

41. Because of Randy's drinking, his job, financial stresses, and his abusive behavior, Peggy separated from him many, many times. During one of the separations, Randy insisted Peggy leave Danny with him. This separation lasted for a couple months.

Danny's Head Injuries

42. Danny suffered a series of head injuries throughout his life, starting from birth. The use of forceps in order to turn Danny around because of his breeched position, left him bruises on both temples, at the base of his neck, and the back of the head, among other injuries. Starting at about age four (4), Danny had blackouts and would pass out, often hitting his head during the episodes.

43. As stated above, when Danny was about five-and-a-half (5½) years old, Peggy found Danny regaining consciousness, lying underneath the swing set. She suspected Eland, Danny's first step-father, had hit Danny or thrown him off the slide. Danny's face was red and he vomited, indicating he had a concussion. Eland inflicted other early childhood head injuries. Eland would constantly hit Danny hard on the side of the head, on his ear or right behind his ear. Danny often had earaches as a result of Eland's blows.

44. When Danny was about eleven (11) years old, he fell head-first off a roof onto the metal frame of a horizontal dolly, in an attempt to

retrieve a ball. His eye hit the metal bar of the dolly. He was unconscious for about five (5) to ten (10) minutes. Danny was taken to a hospital emergency room. He had a concussion, his eye was swollen shut and he had swelling in the brain. The doctor was amazed that Danny did not break his eye socket. Danny's blood vessels were broken and he had to wear a band around his eye for awhile. He also experienced dizziness, double-vision and migraines. In fact, Danny continues to suffer from migraines.

45. When Danny was about fifteen (15) years old, he fell off a second story scaffold and hit his head as he was helping a neighbor prepare a house for painting. He had a bruise on his left temple and a terrible headache for days after the fall.

46. As a young adult, Danny had at least three (3) car accidents where he lost consciousness.

47. In 1983, when Danny was in the military, he was mugged and beaten with a two-by-four. A Sheriff, found Danny unconscious, in a ditch. He was taken to a hospital where he was released several days later with a diagnosis of head trauma, alcohol intoxication and concussion.

48. When Danny was about twenty-three (23) years old, he was beat up at a family wedding by a man who was jealous of Danny. The man kicked Danny in the head and left him all bloody.

Danny's head swelled up as a result.

49. In addition, in 1992, Danny was assaulted in the Mohave County Jail by six (6) men. That assault left Danny with permanent damage to his left eye.

Substance abuse

50. Danny would spend weekends with his grandparents at "the desert house," in Yucca Valley. Danny's grandfather Joe LeSuer and his Uncle Dale liked to see how drunk they could get Danny. When Danny was about nine (9) years old, they made Danny drink a six (6) pack of beer and he was violently ill for days.

51. Danny's sadistic introduction to alcohol and drugs was by his grandfather Joe. Danny's grandfather began using beer and pot as a tool to keep Danny quiet about the sexual abuse he was committing. Often times the predator will make the child believe that they are also doing something wrong, giving the child the impression that they are in a conspiracy together. Danny's grandfather began giving him beer when he was as young as nine (9) years old. Danny continued to drink and smoke with his grandfather, Joe LeSuer, for years, which is also how long the sexual abuse lasted.

52. Danny smoked marijuana all through junior high school. Toward the end of junior high school, he was smoking every day whenever he

could (at lunch time, before school etc.). In addition, he was drinking from a twelve (12) pack to a case of beer a week. The first time Danny tried hard liquor, he had just witnessed the accidental death of his good friend when he was about fifteen (15) years old. This accident occurred while Danny and his friend were racing down a mountain road on home-made luge boards. His friend's board was accidentally bumped by Danny's and he went flying off the ravine. Danny began drinking hard liquor to deal with the guilt he felt and still does, over his friend's death.

53. Because Randy was a police officer, Danny had to prove himself to his friends in order to fit in and not be rejected as the kid of a cop. He had to "party twice as hard" in order to avoid being picked on.

54. By the time Danny reached the ninth (9th) grade he was using marijuana and drinking every day. He cut a lot of school to get high and drunk. He always found a way to get the drugs or alcohol.

55. When Danny started high school, he began experimenting more and more with harder drugs. He tried Valium and went through a period of using LSD (about two hundred (200) times) in high school. Danny was also snorting cocaine at that time and using "speed," or "black beauties", which are amphetamines, in addition to alcohol. Danny got these drugs from friends or dealers in high school. He and his friends would pool their

money together to buy drugs. By the time Danny was approaching twelfth (12th) grade, he was using up to one (1) gram of cocaine on the weekends.

56. Danny was failing high school. In an effort to "clean up his act" and join the Marines, Danny stopped using most of the drugs and graduated from a continuation school. On graduation day, Danny smoked two (2) joints laced with PCP.

57. Once Danny joined the military, he was routinely drug-tested, so he stopped using drugs; however, his alcohol abuse escalated. Shortly after returning home from boot camp, Danny drank a fifth of Jack Daniels and had a "blackout." After boot camp, Danny's performance was poor because of his drinking and he was getting in a lot of trouble. Because of this, Danny was transferred to Camp LeJuene, North Carolina. At that time Danny was drinking two (2) fifths of hard liquor a week. It was at this point that Danny began doing cocaine and speed again.

58. In July 1983, while Danny was in Atlantic Beach in North Carolina, he buried a gallon of vodka in the sand and drank it with a straw and blacked out. He was later found lying unconscious in a ditch along the highway, by a Morehead City Police Officer, who took him to the hospital. Danny had been mugged and beaten with a two-by-four.

59. While in North Carolina, Danny was placed in a six (6) week inpatient program and prescribed Antabuse, but was terminated after five (5) weeks because of a larceny charge. By this time, hospital records indicate, Danny could tolerate a fifth of liquor in a twenty-four (24) hour period.

60. After his discharge from the Marines, Danny returned home. About one (1) month later he began using cocaine, methamphetamine ("meth"), marijuana and alcohol. Sometimes he would get "too high" and would use marijuana and alcohol to come down. Danny began injecting meth and cocaine in 1985. He would often mix the two for a more potent high. He was using around three and a half (3½) grams intravenously every day.

61. Danny tried to quit on his own but was unable. He even admitted himself to a hospital emergency room complaining of withdrawal symptoms. Finally, in February 1986, Danny entered a twenty-eight (28) day inpatient program at Northern Areas Substance Abuse Council (NASAC), which he successfully completed. Danny however, failed to complete the follow-up program consisting of Alcoholics Anonymous and Narcotics Anonymous meetings and began abusing drugs and alcohol again.

62. Danny knew his habits were out of control and that he needed help. After a suicide attempt in 1987, where he tried to cut his wrists and chest with glass, Danny realized he hit

bottom. He sought help from his probation officer who arranged for Danny's admission into Delancey Street Foundation, a rehabilitation facility. He was accepted immediately. Danny was a resident there from July 7, 1987 to March 20, 1989.

63. However, the day he left Delancey Street, he started using cocaine again. Danny stayed with a friend from Delancey Street who had been released a couple weeks before and he continued to abuse cocaine/alcohol. Danny stole some money from his friend and stayed at motel room with a prostitute for thirty (30) days in Carson City, Nevada. Danny smoked crack for twenty-eight (28) of those days straight. This was his first experience with crack cocaine.

64. Danny then returned to his parents' home for a short time. Because he was living in his parents' home, he only used alcohol and marijuana. Danny was also periodically experiencing blackouts. During this same period, Danny moved in with his sister and brother-in-law. Danny was trying not to start using heavy drugs again, but his brother-in-law used cocaine and Danny could not resist the temptation and began using again. When he left his sister's home, he moved to Bullhead City, Arizona, to his grandparents' home. He was snorting meth and drinking daily. In an effort to control his drag and alcohol abuse, he would try to only have twenty (20) dollars with him at any one time.

65. By the end of 1991, Danny was working temporary jobs and stealing to support his drug habit, which was out of control. Danny was back to using up to three and a half (3½) grams of cocaine a day and was on a dangerous cycle of doing cocaine and/or meth and then using marijuana or alcohol to come down.

66. In Bullhead City meth was plentiful. Danny would typically be awake continuously for several days at a time. He might sleep every fourth (4th) or fifth (5th) day. This is what is called a "run." By this time he was using approximately two (2) grams of meth a day; snorting it, smoking it and shooting it. Danny's longest run lasted thirteen (13) days. While on this run Danny began to see shadows and lights began to bother him. In addition, he became short-tempered and paranoid at times. This is when Danny met Frank Sperlazzo. Frank was a meth dealer.

PSYCHIATRIC DIAGNOSES

Introduction and Summary

67. Any accurate assessment of an individual's mental health requires a full and informed understanding of that individual's life experiences and his functioning over time. In order to understand Danny's physical, psychiatric and psychological development, it is important to consider the biological, environmental, social, and psychiatric factors that affected both him and his

family and to examine the interrelationships among these different realms.

68. A devastating accumulation of risks/ deficiencies shaped Danny's childhood and adolescent development and had a direct impact on his behavior as a young adult. Before Danny was born he was at risk. Danny was born with a genetic predisposition for learning disabilities, substance abuse and mental illness, which is evident in both sides of his family, primarily from the paternal side. In addition, Danny was compromised by a toxic and nutritionally deficient fetal development.

69. After surviving a near fatal birth, Danny's life only got more difficult He suffered verbal, psychological, physical and sexual abuse at the hands of his first step-father, second step-father, grandfather and to some extent his mother. Although his mother, as a result of a form of Battered Woman Syndrome, had a passive role, her inability to defend Danny against the abuse isolated Danny and reinforced, Danny's perception that he was worthless. The effects of child abuse are severe, disabling and frequently irreversible, even with treatment. An abused child is left with physical and emotional scars and changes in brain physiology, which remain long after the abuse, or the threat of abuse ceases. This extensive child abuse causes life-long damage clinically diagnosed as Post Traumatic Stress Disorder (PTSD).

70. In Danny, child abuse was only one factor/risk contributing to his cognitive dysfunction. Cognitive dysfunction was previously described as "organic brain damage." Danny suffered a series of head injuries, which began at birth and continued into his adult life. Another contributing factor/risk was Danny's toxic and nutritionally deficient fetal development, which included chrome exposure as well as nicotine.

71. As stated above, Danny was genetically predisposed to substance abuse. His familial pattern illustrates generations of substance abuse. In addition, Danny's attraction to substances were propelled by a need to self-medicate effects of PTSD, Attention-Deficit/Hyperactivity Disorder (AD/HD) and a Mood Disorder. This actually created a dangerous cycle where alcohol and drugs only partially treated these conditions and resulted in serious complications of his drug and alcohol use.

72. Danny's abuse, psychiatric disorders and biological factors/risks have been significantly interrelated his entire life. This physical and psychiatric history cannot be separated from the actions that have placed Danny on death row. Likewise, in order to understand the casual connection between these psychiatric findings and the crimes, all of factors/risks must be considered together as they are not mutually exclusive, but in

fact interwoven. [1]

I. Cognitive Dysfunction

a. Head Injuries

73. As set forth in greater detail above, Danny suffered a series of head injuries throughout his entire life, beginning with his birth. The first few years of Danny's life, Eland was responsible for the blows, which, on one occasion rendered Danny unconscious and caused him to vomit, indicating he had sustained a concussion.

74. As an adolescent Danny fell off a roof and a scaffold, causing loss of consciousness and concussions. He also experienced dizziness, double-vision and migraines, which he continues to suffer from to this day. This pattern of head injuries continued as a young adult. Danny had at least three (3) car accidents where he lost consciousness.

75. Finally in 1983, when Danny was in the military, he was mugged and beaten with a two-by-four and was found unconscious in a ditch. In addition to these incidents, as a result of

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[1] The reader will find the disorders and, therefore, the facts supporting those findings are under several categories. This illustrates the nature of the interrelationship.

substance abuse, Danny was in several "bar fights" during which he suffered numerous head injuries.

76. Any one of the head injuries/traumas illustrated above could have caused the cognitive impairment diagnosed by Dr. Sreenivasan. However, the cumulative effect of repeated head trauma is an increase in aggressive outbursts, mood instability and general impulse control problems. Danny's cognitive and emotional functioning have been compromised by cumulative brain injury rendering Danny susceptible to impulsive behavior.

b. Substance Abuse

77. Danny's sadistic introduction to alcohol and drugs was by his grandfather Joe LeSuer. Danny's grandfather began using beer and pot as a tool to keep Danny quiet about the sexual abuse he was committing. Often times the predator will make the child believe that they are also doing something wrong, giving the child the impression that they are in a conspiracy together.

78. This began Danny's battle with long-term substance abuse that did not end until he was incarcerated for this crime. Early substance abuse (possibly as early as nine (9) years old), is indicative of self-medicating for PTSD (caused by, among other events, physical and sexual abuse), ADHD and a Mood Disorder. As illustrated above, Danny's alcohol and drug abuse escalated to near

lethal quantities.

79. By the time Danny was in high school he was using cocaine and LSD. After joining the military he moved on to amphetamines and meth in addition to hard liquor. Once discharged, he began mixing cocaine and methamphetamine for a more potent high. Sometimes he would get "too high" and would use marijuana and alcohol to come down. He was using around three and a half (3½) grams intravenously every day. Danny tried every drug imaginable and he knew he was out of control.

80. Danny tried several times to stop using drugs and alcohol, but either failed the program or started using immediately after. His drug use put him in the hospital for withdrawal symptoms and an attempted suicide.

81. This long-term poly-substance abuse has compromised Danny's cognitive and emotional functioning and further rendered Danny susceptible to impulsive behavior.

c. Attention-Deficit/Hyperactivity Disorder (AD/HD)

82. Danny school records reflect a below average student. Danny recalled having problems in school. He tried to keep up by using "tricks" like putting his fingers on words that went together but soon school got too difficult and he could not keep up. He decided to start "cutting" classes. He

would rather be known as a "kid who cut" classes than an "idiot" or "stupid."

83. Danny's undiagnosed AD/HD caused him serious problems. He was unable to function at school and was more susceptible to being misunderstood as a behavior problem rather than a special needs student, therefore Danny chose to do drugs and cut school instead.

84. AD/HD is an organically-mediated disorder of the brain's neurotransmitters' system. This neurotransmitter deregulation, results in significant cognitive dysfunction. This AD/HD condition further contributed to his cognitive dysfunction. Just as his substance abuse and head injuries, Danny's AD/HD also contributed to his impulse control problems.

d. Post Traumatic Stress Disorder (PTSD)

85. As noted in Dr. Foy's report, a previously unrecognized problem associated with Post Traumatic Stress Disorder (PTSD), is cognitive dysfunction. To avoid repetition, please refer to Dr. Foy's well-written account of Danny's life history and diagnosis, regarding PTSD, with which I completely concur.

c. Mood Disorder, Not Otherwise Specified [NOS]

86. Without medication and therapy, a Mood Disorder can be a severely debilitating mental illness. In addition, Mood Disorders, such as Danny's,[2] also contribute to his cognitive dysfunction. From an early age, Danny displayed symptoms consistent with a Mood Disorder. This Mood Disorder has both an organic and a psychological ideology. The organic portion is most likely due to both sides of his family having an extensive history of Mood Disorders. It is an accepted medical fact that Mood Disorders are genetically-determined mental conditions. The psychological portion of this Mood Disorder is the extensive physical, sexual and emotional abuse he was subjected to at a very early age.

87. The combination of these functions resulted in Danny's display of explosive outbursts, aggression and significant mood swings, that began around age thirteen (13). He was even treated for this condition for a short period of time with a mood stabilizer, Lithium. During this period of Lithium treatment his mother stated "I got my son back." Unfortunately, Danny did not continue this treatment. (Of note, Danny is currently being treated with Lithium and the antidepressant, Elavil by the Arizona Department of Corrections).

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[2] See Section IV below.

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f. Prenatal Factors

88. It is well-established that a child's fetal development is critical. Danny was exposed to a series of prenatal trauma that negatively impacted his development and functioning.

89. As stated above, when Peggy discovered she was pregnant with Danny she was working at a chrome-plating factory. She was only fourteen (14) years old at the time. Peggy's job was to take the freshly chrome-dipped hubcaps off the conveyor belt, sand, clean and buff them. She was not given a face mask and she inhaled the chemicals and dust all day. This was a difficult job for even the healthiest person. This was evidenced by the high turnover rate. Peggy was sick almost every day (even before she was pregnant), however she needed the job in order to support her family.

90. The dangers of chrome vary based on the degree of exposure. Peggy's exposure to Chromium VI (Cr-VI), as described by Peggy was exceptionally high. Because of her age (14 years old), the exposure had a heightened effect on her physically and on her central nervous system. In addition, without ventilation and without a mask, Peggy buffed hubcaps for eight (8) to ten (10) hours a day, thus inhaling the dust created by the Cr-VI.[3]

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[3] While some of the known effects are discussed in this declaration, others may include cell, chromosomal DNA

91. Worker safety now requires local exhaust and proper ventilation, which was not required when Peggy worked with Cr-VI. Further recommendations now include splash-proof goggles, face shield, chemical resistant gloves, apron and boots. None of these protections were available for Peggy.

92. Birth complications, such as Danny's, are consistent with exposure to Cr-VI. In addition testicular problems, which are well-documented with Danny are also consistent with Cr-VI exposure. Furthermore, because Cr-VI is a known carcinogen, exposure in smokers creates an increased risk.

93. High levels of exposure, of the type that Peggy was exposed to, appear to cause neurological damage.

94. Nicotine and caffeine intake (even without the CR-IV exposure), are proven to be detrimental to fetal development. As set forth above, because of a lack of money, Peggy's nutrition consisted of a pot of coffee, mayonnaise and bread sandwiches and packs of cigarettes. During her pregnancy Peggy was malnourished

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and neurological damage. Birth complications as well as elevated levels of chrome in the umbilical cord, placenta, and breast milk, were present in woman exposed to chrome during their pregnancy. See David Freeman's Declaration, July 29, 2002.

and relied on nicotine and caffeine to get her through the day. The effects of nicotine on fetal development are well-established. More recently the harmful effects of caffeine have been exposed. These include an increased risk of miscarriage, low birth weight, heart abnormalities, Sudden Infant Death Syndrome (SIDS). In addition caffeine also interferes with the absorption of vitamins and mineral causing fetal malnutrition.

95. In addition to the toxins and malnutrition, Danny also suffered fetal trauma at the hands of his biological father, Jimmie Beck. Beck continued to beat Peggy while she was pregnant with Danny. After one of these beatings, when Peggy was three (3) months pregnant, she began bleeding and was told by her doctor that her placenta was separating. In addition, two weeks before Danny was born Beck pushed Peggy down the stairs, punched her in the face and kicked her in the stomach. This incident left her with a black eye and bleeding again. These bleeding episodes are indications of fetal trauma.

96. The combination of chrome exposure, nicotine and caffeine ingestion, coupled with malnutrition and the fetal trauma caused by beatings by Beck, supports the finding that Danny's fetal development contributed to his impaired cognitive development.

II. POST TRAUMATIC STRESS DISORDER (PTSD)

97. At a very early age Danny lived through several traumatic experiences that created "formidable, possibly insurmountable, obstacles in the path of appropriate, normal psychological development..." *See* Dr. Foy's Report dated September 8, 2002. Those traumatic experiences include Danny's long-term observations of his mother being beaten by two (2) step-fathers, long-term physical abuse and tyrannical discipline, repeated sexual abuse (fondling, oral sex and sodomy) at the hands of his (step) grandfather and the tragic death of his friend for which Danny felt responsible. To avoid repetition, please refer to Dr. Foy's well-written account of Danny's life history and diagnosis, regarding PTSD, with which I completely concur.

III. POLY-SUBSTANCE ABUSE

98. Danny's genetic loading combined with his abusive and traumatic childhood, family environment and underlying mental illness and cognitive dysfunction, caused him to be predisposed to the disease of substance abuse.

a. Genetic Predisposition

99. Danny's biological and genetic history has predisposed him to substance abuse. Danny's biological father, paternal grandmother and grandfather were alcoholics. Jimmie Beck,

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Danny's biological father, was already an alcoholic when Peggy met him, when he was eighteen (18) years old. He had been stealing alcohol from his father from the time he was twelve (12) years old. Often times, Peggy would stay out of the house until he passed out in order to avoid the conflicts and/or beatings. Danny's paternal grandmother, Wanda, was an alcoholic and drank until she passed out on the couch. Wanda developed liver problems, most likely due to her drinking.

100. Studies confirm a strong correlation between a genetic history of substance abuse disorders and predisposition to developing the disease of substance abuse. Also this social history demonstrates the severity of addictions within the family. Although Danny's alcohol and drug use began as a method of self-medication, his excessive use sprang from a genetically inherited predisposition to the disease of substance abuse.

b. Self-Medicate

101. Danny's attraction to substances was propelled by a need to self-medicate effects of PTSD, Attention-Deficit/Hyperactivity Disorder (AD/HD) and a Mood Disorder. This actually created a dangerous cycle where alcohol and drugs only partially treated these conditions and resulted in serious complications secondary to his drug and alcohol use.

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IV. Attention-Deficit/Hyperactivity Disorder (AD/HD)

102. Attention Deficit/Hyperactivity Disorder (AD/HD) has damaging effects in several psychiatric aspects. In addition to causing cognitive dysfunction[4], the effects of AD/HD is responsible for many individuals' need to self-medicate with alcohol or drugs.[5] Notwithstanding these collateral effects of AD/HD, the severity of this disorder can be debilitating in untreated individuals. Individuals with AD/HD are impulsive, disorganized, socially inappropriate and generally unable to succeed. These characteristics can make daily functioning extremely difficult. Often times, AD/HD goes undiagnosed and untreated because the child is dismissed as a behavioral problem.

103. Although it is unclear exactly how AD/HD is caused, prenatal trauma and deficits,[6] such as those experienced by Danny, substantially increase the risk of AD/HD.

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[4] See Section 1(c).

[5] See Section III(b).

[6] See Section I(f) for a complete description of these factors.

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V. Mood Disorder, Not Otherwise Specified [NOS]

104. This mood disorder category includes disorders with criteria that do not fit into any other category or has symptoms, which may fit under more than one disorder. *Diagnostic and Statistical Manual of Mental Disorders.* (Fourth Edition, Text-Revised) ["DSM-IV-TR"], p. 410.

a. Prenatal Factors

105. In addition to causing cognitive dysfunction, the above-described prenatal factors/ deficiencies, can also lead to the type of mood disorder observed in Danny.[7]

b. Paternal Family

106. Danny's biological father more than likely suffered from an Affective Disorder such as Bipolar Disorder, which is a major mental illness. According to Peggy, Beck had a "learning disability" because he was "flunking out of school" when she met him.

107. In addition to being an alcoholic, Beck was also physically abusive, especially when he was drunk. He hit Peggy and offered her to his friends for sex. When she refused to have sex with

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[7] See Section I(f) for a complete description of these factors.

his friends he would beat her.

108. Beck could not hold a job, therefore Peggy was the primary income earner at age fourteen (14). Peggy and Beck lived in a series of travel trailers and once even in a railroad boxcar once. Beck had no sense of planning for the future. When he did not gamble or drink what little money he earned, Beck would spend it on his girlfriends.

109. Beck was involved in risk-taking behaviors. He would run stop signs, drag-race or try to flip the car. In addition he experienced dramatic mood swings. At times Beck was full of energy and happy. During these periods of hypomania, he would stay up several nights in a row to complete a project. On the other extreme, there were times when Beck was depressed, stayed at home and did not shower, shave or brush his teeth for days. These symptoms are all indicative of Bipolar Disorder, formally known as Manic Depression.

110. In addition to being an alcoholic, Danny's paternal grandmother, Wanda, was also mentally unstable. She had several mental breakdowns and had to be hospitalized. It was also Wanda's idea to sell Danny and went so far as find to a buyer.

111. Danny's paternal grandfather, James, was also an alcoholic. Danny's paternal uncle, Bobby, also had a "mental breakdown" and had to

be hospitalized. In addition, another paternal uncle (half-brother to Danny's biological father) was developmentally disabled.

c. Maternal Family

112. Danny's maternal family are prone to mood swings and impulsive behavior. Peggy's mother, Blanche has been married six (6) times, twice to the same man. Once she gave away all her belongings, two homes, cars and furniture in order to move away, only to return penniless months later. In addition she is a gambler and an "escapist." Blanche would literally run into the woods to get away from her problems.

113. Peggy's father also has a history of impulsive behavior including quitting his job six (6) months before retirement, resulting in this losing all his benefits from thirty (30) years of employment.

114. In Peggy's family there is also a history of unidentified neurological impairments and problems. Peggy had "fits" as a child and had a couple of "seizures" when Danny was growing up. In addition, Danny has a cousin who is mentally retarded and other with brain tumors. Danny's Aunt Gale, is currently suffering from brain hemorrhages.

115. As previously noted, mood disorders of the type that affects Danny, carry a strong genetic component. The diagnosis of this disorder

is further bolstered by the familial history of multigenerational mental illness.

c. Head Injuries/Trauma

116. As stated above, Danny has an extensive history of head injures and trauma.[8] In addition to causing cognitive dysfunction, head injuries, such as the type suffered by Danny, can cause or exacerbate an already existing mood disorder.

117. Danny's extensive familial history, in addition to his own symptomatic behavior, is indicative of a genetic predisposition to a mood disorder. This, coupled with several factors/risks of prenatal trauma and substantial head injuries, lead to the conclusion that Danny also suffers from a serious mental illness categorized as Mood Disorder, NOS.

CONCLUSIONS

118. In addition to reviewing documents, investigative interviews and declarations relating to Danny's social medical and psychiatric history I also reviewed relevant trial, sentencing and post-conviction transcripts. As part of understanding how and why Danny ended up on death row, I

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[8] See Section I (a) and the background and factual information above for the detailed accounts of substantial head trauma.

reviewed accounts of the crime. It is apparent from the records that Robert Weaver was beaten with a baseball bat in manner, which may be considered "overkill." Danny has not wavered in taking responsibility for Mr. Weaver's death. The circumstances surrounding Mr. Weaver's death are a direct consequence of Danny's abused and unfortunate past. It is of great significance that Danny had to at least twice in his young life defend himself in a life-threatening situation with a baseball bat. One of the times, was when he stopped his grandfather from continuing years of severe sexual abuse by threatening him with a baseball bat. It is my professional opinion that at the time of Mr. Weaver's death Danny was acting under the effects of PTSD, as diagnosed by Dr. Foy.

119. It is further my professional opinion, which I hold to a medical certainty, that Danny suffers from cognitive dysfunction, formally defined as "organic brain damage." The causes and contributing factors surrounding Danny's "brain damage" are extensive, complex and interwoven.[9] This psychiatric condition is further compromised by Post Traumatic Stress Disorder, Poly-Substance Abuse, Attention-Deficit/Hyperactivity Disorder and a Mood Disorder, NOS.[10] The result of these mental illnesses, biological,

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[9] See Section I, Cognitive Dysfunction.

[10] See Sections II, III, IV and V.

environmental, social and other compromising factors, culminated in, at the time of the murder, an impairment in Danny's capacity to appreciate the wrongfulness of his actions and/or to conform his conduct to that required by the law. In other words, for all the reasons stated in this declaration, Danny's conduct was out of control, impulsive and once he started, he could not stop.

120. In addition, I have reviewed Danny's account of the crimes. Danny has explained the involvement of an individual named "Frank." Danny asserts that "Frank" is the person who murdered the child, Tisha Weaver. There is no evidence that Danny has ever mistreated, abused or harmed, any child in any way. In fact, Danny was by all accounts, a good step-father and now is a good father. Further, as stated by Dr. Foy, Danny has a history of submissive, almost child-like behavior, against older males, that he perceives are more powerful than him. This is reminiscent and a direct effect, of all the males that abused him in the past. As a result, it is my professional opinion that Danny's psychological profile supports the events as described by Danny on the night of the crimes, including Frank's responsibility for Tisha Weaver's murder.

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I declare under of perjury under the laws of the State of California and the United States that the foregoing is true and correct. Executed this 10th day of September, 2002.

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Pablo Stewart, M.D.